IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 448 OF 2003

Shri Uday Ashok Dahanukar .. Petitioner

Vs.

M/s. Dahanukar Construction
and ors. .. Respondents

Mr. G.S. Godbole for petitioner.
Mr. A.V. Anturkar for respondent no.2.
Mr. Madhav Jamdar for respondent no.3.

CORAM: B.H. MARLAPALLE, J.

Date : June 29, 2006.

P.C.:

1. Heard Mr. Godbole, the learned counsel for the petitioner, Mr. Anturkar the learned counsel for the respondent no.2 and Mr. Jamdar the learned counsel for respondent no.3.

2. The petitioner was one of the partners of the respondent no.1-firm along with respondent nos.1A and

3 as well as respondent nos.4 to 6 and as he was required to be away from the country and be with his mother in U.S.A., the petitioner had executed a Power of Attorney in favour of the respondent no.2 on 12/9/1995. The petitioner was impleaded as the sole defendant in RCS No.811 of 1999 and notice of the same issued was served on the present respondent no.2 in his capacity as the Power of Attorney of the petitioner and that the Power of Attorney had filed a caveat before the trial court. On the basis of a joint pursis submitted by the plaintiff and the defendant through his Power of Attorney, the suit came to be decided in terms of the compromise decree on 2/6/1999.

3. On or about 22/2/2000 petitioner has instituted Regular Civil Suit No.378 of 2000 praying for a declaration that the compromise decree dated 2/6/1999 passed in RCS No.811 of 1999 by the 8th Joint Civil Judge, Junior Division at Pune was obtained by perpetration of fraud on the court and the plaintiff i.e. the petitioner and also for setting aside the said compromise decree. By filing an application at

Exh.5 in the said suit, the petitioner-plaintiff prayed for temporary injunction orders restraining the defendants from acting and/or using the decree under challenge in any manner whatsoever, from creating any third party interest with the partnership properties till the final disposal of the suit. After hearing the parties concerned, the learned Judge of the trial court was pleased to reject the application at Exh.5 by his order dated 25/4/2001 and the said order was challenged in the Misc.Civil Appeal No.221 of 2001. The learned IInd Additional District Judge at Puns was pleased to dismiss the said appeal by his Judgment and Order dated 30/4/2002. This order of the Lower Appellate Court was challenged in Civil Revision Application No.1241 of 2002 before this court and while issuing notices, ad-interim reliefs in terms of prayer clauses (c), (d) and (e) was granted on 2/8/2002. The Civil Revision Application was disposed as not maintainable with liberty to the petitioner to file a Writ Petition as per the order passed by this court on 18/12/2002 and that is how this petition under Article 227 of the Constitution has been moved.

4. The main question that is required to be considered in this petition is, whether the petitioner-plaintiff was successful in making out a prima facie case for granting temporary injunction orders in RCS No.378/2000. This fresh suit filed by the plaintiff praying for setting aside the compromise decree passed in RCS No.811 of 1999 is solely based on the allegations that the compromise decree was a fraud on the court as well as the plaintiff and the main accusation is against the present respondent no.2 who was the Power of Attorney holder of the petitioner. Mr. Godbole, the learned counsel for the petitioner submitted that respondent no.2 failed to act as a prudent person to protect the interest of his principal and while discharging his duty as an agent, he colluded with the plaintiff in RCS No.811 of 1999 and thus robbed the petitioner of his valuable property rights. Various dates were referred to point out that there was a collusion between the plaintiff in RCS No.811/1999 and the present respondent no.2. These allegations by themselves would not make out a prima facie case for an order of temporary injunction. It would be also necessary to scan the actions taken

by the petitioner himself. The compromise decree was passed on 2/6/1999, the petitioner claims to have returned to India on or about 20/10/1995 and on his return, he had taken in his custody the original document appointing respondent no.2 as his attorney. The date for this event is not mentioned but it is clear that the compromise decree was passed when the petitioner was in India. He claims to have withdrawn the Power of Attorney given to the respondent no.2 as per the Advocate's notice dated 15/6/1999 i.e. within about less than two weeks from the date of the compromise decree. In the suit filed by him i.e. RCS No.3378 of 2000 he has stated that the cause of action to file the suit arose on 2/9/1999 when the plaintiff acquired a knowledge of the impugned compromise decree. Surprisingly no prompt steps were taken by the petitioner after 2/6/1999 to challenge the decree until he filed RCS No.378 of 2000 on or about 22/2/2000 and till then the compromise decree operated.

5. Whether respondent no.2 was guilty of playing fraud on the plaintiff or on the court is an issue

which has to be decided on the basis of the evidence that the parties may lead in RCS No.378 of 2000 and filing of such a suit by itself would not make out a prima facie case in favour of the plaintiff unless he by his own actions demonstrated that he moved before the court at the earliest against the alleged fraudulent decree. The plaintiff did not move the court almost for about eight months or more. The Power of Attorney given as per the plaintiff is withdrawn for the first time by the Advocate's notice dated 15/6/1999 and, therefore, both the courts below were justified in declining to favour the petitioner by a temporary relief of injunction pending the suit.

6. Mr. Godbole the learned counsel for the petitioner referred to the ad-interim orders passed by this court on 24/2/2003 and submitted that the ex parte ad-interim reliefs in terms of prayer clauses (c), (d) and (e) is operating even as on today and, therefore, the said injunction is required to be continued by directing the trial of the suit to be expedited. In support of his submissions Mr. Godbole relied upon a decision of this court (Single Bench) in

the case of Govinda Bhagoji Kamable and ors. vs. Sadu Bapu Kamable and ors. [2005(1) Mh. L.J. 651]. At the outset, it must be stated that the decision in Govinda Kamable's case is not applicable on the facts of the present case. After the ad-interim order was granted in this petition on 24/2/2003 it came to be listed on 3/7/2003 for compliances and para (c) of the order passed on that day reads as under:-

> "(c) In cases where any of the Respondent(s) have not been served so far, for whatever reasons, the Petitioner(s) to take steps to serve the said unserved Respondent(s) within Six Weeks from today by Advocate's notice, either personally or through speed post/courier/e-mail/fax and to file the affidavit of service before that date, failing which the Petition/Application to stand dismissed for non-prosecution as against the said Respondent(s) without further reference to the Court."

. The six weeks time from 3/7/2003 would expire on 10/8/2003 and from the record it is seen that the affidavit under Stamp No.4858/03 came to be filed by the learned Advocate on 31/7/2003 stating that he had sent the notices to the unserved respondents. The affidavit of service on the unserved respondents and registered as Stamp No.6060/2003 came to be filed for the first time on 2/9/2003 i.e. after the dead line of six weeks was over on 10/8/2003. This petition surprisingly did not come up on board for almost three years i.e. till 6/6/06 and it is not known what steps were taken by the petitioner in the meanwhile i.e. from 10/8/2003 till 6/6/2006. In fact, the order passed by this court on 3/7/2003 was self operative and failure to file an affidavit of service by 10/8/2003 by the petitioner’s advocate resulted in dismissal of the petition against the unserved respondents i.e. respondent nos.1 and 3 to 6 and if the petition was dismissed in default, naturally the ad-interim order would automatically stand vacated at least against those respondents. I, therefore, do not accept the submissions of Mr. Godbole that the

ad-interim relief granted by this court on 24/2/2003 continues to operate even as on today. If such an interpretation is accepted it would amount to a premium on failure to take appropriate steps for getting the petition placed before the court for hearing/orders in the admission board and the party obtaining ad-interim injunction must be vigilant in keeping with the requirement of Order XXXIX Rule 3 of C.P.C.

7. It was stated across the bar that during the pendency of this petition and inspite of the public notice dated 21/6/1999 by the petitioner, some flats in the newly constructed building on the suit plot have been sold to third parties. Obviously, if these properties have been sold during the pendency of RCS No.378/2000 there is no reason why the doctrine of lis pendente lite within the meaning of Section 52 of the Transfer of Property Act 1882 will not be applicable and the petitioner is not stopped from taking due steps for the same.

8. In the premises, there is no reason to

interfere with the impugned orders passed by both the courts below and this petition is rejected summarily.

9. Mr. Godbole the learned counsel for the petitioner made an oral application for continuing the ad-interim order. This prayer cannot be considered more so when I have concluded that the order passed on 24/2/2003 cannot be held to be operative as at present. Hence the oral application is rejected.

10. The oral application for stay to this order also stands rejected. However, the trial of the suit is expedited.

(B.H. Marlapalle,J.)